No. 82-1508

STATE OF WISCONSIN : IN SUPREME COURT

Anchor Savings & Loan Association

Petitioner-Appellant-Petitioner,

v.

Equal Opportunities Commission,
City of Madison and
Roy U. Schenk,

Respondents.

REVIEW of a decision of the Court of Appeals. Reversed.

STEINMETZ, J. The issue in this case is whether the city of Madison, through an exercise of its home rule powers, can regulate a state chartered savings and loan association.

The Equal Opportunities Commission (EOC) of the city of Madison found that Anchor Savings & Loan Association (Anchor) discriminated against Roy U. Schenk on the basis of his marital status, in violation of sec. 3.23(3) of the Madison General Ordinances[1], when it denied Schenk a mortgage loan. Anchor argues that Madison did not have the power to regulate the lending practices of a state chartered savings and loan, and in the alternative, that Anchor did not unlawfully discriminate against Schenk.

The circuit court for Dane county, the Honorable Richard W. Bardwell, affirmed the EOC. Upon Anchor's appeal to the court of appeals, that court found Madison had the power to regulate Anchor's lending practices, and Anchor did discriminate against Schenk as to his marital status and therefore it affirmed the circuit court.[2] Anchor petitioned this court for review. We reverse the decision of the court of appeals.

In December, 1977, Schenk, a divorced, single man, applied for a mortgage loan at Anchor in the amount of $24,000 to purchase income property in Madison. As a result of his divorce, Schenk was under a court ordered obligation to pay his former wife and four children $500 a month in support and maintenance.

In evaluating Schenk's credit-worthiness, Anchor applied its customary formula and considered his fixed debt-to-income ratio, a computation that yields the percentage of an applicant's monthly income committed to repayment of recurring fixed expenses. Schenk's percentage exceeded the maximum percentage acceptable and his application was denied. His support and maintenance payments were considered fixed expenses and were used in calculating his percentage. Anchor did not consider as fixed expenses the family maintenance obligations of married persons seeking loans. For married persons such maintenance obligations were considered in loan applications as flexible expenses. Without the support and maintenance payments, Schenk's fixed debt-to-income ratio would not have exceeded the maximum acceptable percentage.[3]

The trial court concluded that the city of Madison could lawfully regulate the lending practices of a state

chartered savings and loan. The court of appeals held that the city of Madison could regulate lending practices of a state chartered savings and loan because there was neither a statutory prohibition nor an infringement of the spirit of state law or policy.

Anchor's challenge to Madison's regulatory power raises a question of law that we review independently. LePoidevin v. Wilson, 111 Wis. 2d 116, 121, 330 N.W. 2d 555 (1983); First Nat. Leasing Corp. v. Madison, 81 Wis. 2d 205, 208, 260 N.W. 2d 251, 253 (1977); Nelson v. Union Nat. Bank, 111 Wis. 2d 313, 315, 330 N.W. 2d 225, 226-27 (Ct. App. 1983).

If the city of Madison has power to regulate credit practices of a savings and loan association, its source must be traced through the home rule provisions of the Wisconsin Constitution, Art. XI, sec. 3(1)[4] and sec. 62.11(5), Stats.[5]

This court considered the issue of the respective powers of the state and municipalities on the subject of legislative enactment in State ex rel. Michalek v. LeGrand, 77 Wis. 2d 520, 527, 253 N.W. 2d 505 (1977), and held that three areas have been outlined as: "(1) Those that are 'exclusively of state-wide concern'; (2) those that 'may be fairly classified as entirely of local character'; and (3) those which 'it is not possible to fit . . . exclusively into one or the other of these two categories.'" (Footnotes omitted.) Madison EOC and the city concede that the regulation of credit is a matter of statewide concern, as well as local concern.

In Wis. Asso. of Food Dealers v. City of Madison, 97 Wis. 2d 426, 432, 293 N.W. 2d 540 (1980), we stated:

> "'The constitutional authority of cities only extends to local affairs and does not cover matters of statewide concern.' Plymouth v. Elsner, 28 Wis. 2d 102, 106, 135 N.W. 2d 799 (1965). See also: Muench v. Public Service Commission, 261 Wis. 492, 53 N.W. 2d 514, on rehearing 261 Wis. 515c, 515c-515d, 515j, 55 N.W. 2d 40 (1952)."

A city ordinance may be authorized by sec. 62.11(5), Stats., notwithstanding statewide concern in the matter it regulates. The question before this court is whether sec. 62.11(5) provides the city of Madison with the power to enact and enforce the ordinance.

In Wis. Asso. of Food Dealers v. City of Madison, 97 Wis. 2d at 432-33, we stated:

> "If a city ordinance exercises a power which the legislature could confer on the city, then the city possesses the power under sec. 62.11(5) unless there is express language elsewhere in the statutes restricting, revoking, or withdrawing the power, or unless state legislation is logically inconsistent with the existence of the power in the city. See: Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 534-35, 271 N.W. 2d 69 (1978), quoting with approval, Comment, Conflicts Between State Statute and Local Ordinance in Wisconsin, 1975 Wis. L. Rev. 840, 848. This court has added a further limitation on a municipality's exercise of authority pursuant to the legislature's broad grant of power in sec. 62.11(5); ordinances may not "'infringe the spirit of a state law or . . . general policy of the state.'" Fox v. Racine, 225 Wis. 542, 545, 275 N.W. 513 (1937): See also: Wis. Environmental Decade, Inc. v. DNR, supra at 534-35. Thus in determining whether a preemption challenge to an ordinance adopted pursuant to sec. 62.11(5) has a reasonable probability of success, a circuit court should assess whether express statutory language has withdrawn, revoked, or restricted the city's power; the probability that the challenged ordinance is logically inconsistent with state legislation; and the probability that the challenged ordinance

> infringes the spirit of a state law or general policy of the state."

Section 62.11(5), Stats., does not limit a municipality's authority to act only in local affairs. As we stated in Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 533, 271 N.W. 2d 69 (1978):

> "Indeed, sec. 62.11(5), Stats., would be a nullity if it were construed to confer on municipalities only that authority which related to 'local affairs' since that power is already constitutionally guaranteed by the home-rule amendment."

In Wis. Environmental Decade, 85 Wis. 2d at 534, we stated:

> "We approve of the rule as set forth by Solheim, Conflicts Between State Statutes and Local Ordinance in Wisconsin, 1975 Wis. L. Rev. 840, 848:
>
> "'2. If a municipality acts within the legislative grant of power but not within the constitutional initiative, the state may withdraw the power to act; so if there is logically conflicting legislation, or an express withdrawal of power, the local ordinance falls. Furthermore, if the state legislation does not logically conflict, or does not expressly withdraw power, it is possible that the local ordinance nevertheless must fall if an intent that such an ordinance not be made can be inferred from the fact that it defeats the purpose or goes against the spirit of the state legislation.'"

This same Wis. Environmental Decade case cited Fox v. Racine, 225 Wis. 542, 545, 275 N.W. 513 (1937), wherein the court stated a municipality may not pass ordinances "'which infringe the spirit of a state law or are repugnant to the general policy of the state.'" This has been the rule in Wisconsin and still is as most recently stated in Wis. Asso. of Food Dealers v. City of Madison, 97 Wis. 2d at 433.

Where a municipality acts within the legislative grant of power but not within the constitutional initiative, the state has the authority to withdraw the power of the municipality to act. The tests for determining whether such a legislatively intended withdrawal of power which would necessarily nullify the local ordinance has occurred are:

(1) whether the legislature has expressly withdrawn the power a of municipalities to act;
(2) whether the ordinance logically conflicts with the state legislation;
(3) whether the ordinance defeats the purpose of the state legislation; or
(4) whether the ordinance goes against the spirit of the state legislation.

Sec. 62.11(5), Stats.; Fox v. Racine, 225 Wis. 542, 546-47; State ex rel. Michalek v. LeGrand, 77 Wis. 2d 520, 530. See also: Solheim, supra.

The state legislature has adopted a complex and comprehensive statutory structure dealing with all aspects of credit and lending in ch. 138, Stats., which governs rates of interest, variable rate contracts, federal rate parity, residential mortgages and credit discrimination. See sec. 138.20.[6] In addition, ch. 215 governs state chartered savings and loan associations. This chapter created the office of the commissioner of savings and loan. Sec. 215.03(1) provides that: "All associations organized under this chapter or similar laws, or permitted by license to transact, in this state, a business similar to that authorized by this chapter, shall be under the supervision and control of the commissioner."

There is a detailed system of control over the decisions of savings and loans through investigation and orders under the commissioner's authority set forth in ch. 215, Stats.

The rules of the commissioner of savings and loan, Wis. Admin. Code, secs. S-L 1.01. et seq., supplement the statutory regulation. Chapter S-L 27 is entitled "Fairness in Lending" and sec. S-L 27.01 defines the purpose of the regulation as follows: "It is the purpose of this chapter to require savings and loan associations to give every applicant an equal opportunity to obtain a loan, by evaluating the applicant's credit-worthiness on an individual basis, without referring to the presumed characteristics of a group or neighborhood." Sec. S-L 27.05 prohibits any lending practice which discriminates on the basis of sex, marital status, race, color, creed, national origin, ancestry, or geographic area.

Section 101.22, Stats., prevents discrimination, including on the basis of marital status in the financing of housing. The statute sets up a comprehensive procedure to handle grievances including investigation and conciliation by the equal rights division of the Department of Industry, Labor and Human Relations, determination by an examiner, review by the commission and, thereafter, if necessary to resolve the dispute, a trial de nova in a court of law. Sec. 101.22(5). Complaints against a savings and loan association are to be referred to and handled by the savings and loan commissioner. Sec. 101.22(8).

The state has devised and adopted as law a complete, all encompassing plan for the treatment of applications for and granting of loans by savings and loan associations. It is the commissioner who is given the responsibility under ch. 215, Stats., to make sure that associations comply with the laws of Wisconsin and the United States. Regulation by the office of the commissioner is on a uniform statewide and industry basis. Regulation is intended to be based on experience in the lending industry, on complete information, with balanced concern for loan applicants on the one hand and for the financial stability of the association on the other. Access to the office of the commissioner is given to all members of the public and a specific procedure for those with complaints is conveniently provided.

Schenk did submit his complaint initially but claimed in his brief the office of the commissioner refused to take his complaint seriously. In this same brief Schenk attaches a letter from the commissioner which states that based on the information submitted to the agency "there is not probable cause to believe that a law administered by this office has been violated." Being disappointed with the commissioner's determination, he complained to the Madison Equal Opportunities Commission. His remedy more appropriately should have been pursued through the established statutory and administrative procedures and then into the state courts for adjudication.

The Madison EOC upheld its examiner's decision, findings of fact, conclusions of law and order which ordered the following:

> "1. Respondent (Anchor] cease and desist from discriminating against Complainant on the basis of marital status in the extension of credit and in making credit sales to the Complainant.
>
> "2. Respondent pay to the Complainant the difference in cost between the loan Complainant applied for from Respondent and the loan Complainant received from First Federal Savings and Loan after rejection by Respondent to be calculated as follows:
>
> "a. Based on $22,900, Respondent shall reimburse Complainant for the 0.5% annual interest difference between 9.25% and 9.75% over a ten-year (10 year) period beginning retroactively from January 10, 1978.
>
> "b. Based on $24,000, the Respondent shall reimburse to Complainant the amounts, if any, by which the cost of the First Federal Loan, including but not limited to appraisal fees and loan fees and abstracting fees, exceeded the costs of the loan that Complainant would have received from Anchor Savings and Loan.

> "3. Respondent shall immediately modify its underwriting standards to not consider court-ordered alimony and child support payments of any applicants as part of the fixed-debt to income ratio, or to consider the analogous family expenses of all applicants as part of the fixed-debt to income ratio. Respondent shall forward a copy of the revised standard to the Madison Equal Opportunities Commission within thirty (30) days of receipt of this order."

By this order, the Madison Equal Opportunities Commission set the requirements and standards for loan qualification for Anchor in Madison. While the Madison EOC has jurisdiction in the city of Madison, that authority does not extend beyond the city's limits and, therefore, its determination may set a criteria not accepted elsewhere in the state as to lending practices. In addition to anti-discrimination standards in lending, consideration must be based on financial criteria and availability of money for loans within the lending institution, having in mind the depositors therein and the return on their investment and the financial stability of the association.

In State ex rel. Michalek v. LeGrand, 77 Wis. 2d 520, 530, we considered a city of Milwaukee ordinance and state statute, both on the subject of rent withholding for local building code violations and the court stated: "They are not locomotives on a collision course. Rather each moves on its own track, parallel and not too far apart, traveling in the same direction." That is not true in the instant case since the collision course is obvious when the Madison EOC ordered Anchor to modify its underwriting standards, a subject preempted by ch. 215, Stats., which governs Anchor and other Wisconsin chartered savings and loan associations.

The regulation and control of Anchor's lending practices has been preempted by the state of Wisconsin in ch. 215, Stats., by establishing a comprehensive and all-encompassing scheme regarding savings and loan association practices, and therefore the Madison EOC was without, authority to review the refusal of Anchor to grant a loan to Roy U. Schenk on the basis of marital status discrimination. The application of the ordinance to Anchor's credit practice was contrary to the spirit of the state's structure of all aspects of redit and lending by savings and loan associations and was without authority and in conflict with the state comprehensive plan.

By the Court--The decision of the court of appeals is reversed.

Filed 2nd of October, 1984

Justice Roland B. Day took no part.
Justice Shirley S. Abrahamson took no part.

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[1]The Madison ordinance sec. 3.23(3) reads:

a "(3) Credit. It shall be an unfair discrimination practice and unlawful and hereby prohibited for any creditor to discriminate against any person in any credit transaction because of sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, political beliefs, or the fact that such person is a student as defined herein."

[2]Anchor Sav. v. Equal Opportunities Comm., 116 Wis. 2d 672, 343 N.W. 2d 122 (Ct. App. 1983).

[3]Thirty-five percent of fixed expenses to income is considered the maximum ratio for credit purposes. Thirty-six or thirty-seven percent ratio may be permissible depending on other factors, i.e., sizable down payment or large personal net worth.

[4]Art. XI, sec. 3(1), Wisconsin Constitution provides:

"Cities and villages organized pursuant to state law-may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state wide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature."

[5]Sec. 62.11(5), Stats., provides:

"POWERS. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language."

[6]Sec. 138.20, Stats., provides:

"Discrimination in granting credit or loans prohibited. (1) RULE. No financial organization, as defined under 71.07(2)(d)1, or any other credit granting commercial institution may discriminate in the granting or extension of any form of loan or credit, or of the privilege or capacity to obtain any form of loan or credit, on the basis of the applicant's physical condition, developmental disability as defined in s. 51.01(5). sex or marital status; provided, however, that no such organization or institution shall be required to grant or extend any form of loan or credit to any person who such organization or institution has evidence demonstrating the applicant's lack of legal capacity to contract therefor or to contract with respect to any mortgage or security interest in collateral related thereto.

"(2) PENALTY. Any person violating this section may be fined not more than $1,000. Each individual who is discriminated against under this section constitutes a separate violation."

No. 82-1508

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

Anchor Savings & Loan Association

Petitioner-Appellant,

v.

Equal Opportunities Commission,
City of Madison
and Roy U. Schenk,

Respondents.

APPEAL from a judgment of the circuit court for Dane county: RICHARD W. BARDWELL, Judge. Affirmed.

Before Foley, P.J., Dean and Cane, JJ.

DEAN, J. Anchor Savings & Loan Association appeals from a judgment affirming an order of the Equal Opportunities Commission of the City of Madison. The commission found that Anchor discriminated against Roy Schenk on the basis of his marital status, in violation of a city ordinance, when it denied Schenk a mortgage loan. Anchor argues that Madison did not have the power to regulate the lending practices of a state chartered savings and loan, and that Anchor did not unlawfully discriminate against Schenk. Because Madison did have the power to regulate Anchor and because Anchor did discriminate against Schenk based on his marital status, we affirm.

Schenk applied to Anchor for a mortgage loan. He was divorced and had court-ordered support and maintenance payments of $500 per month. In evaluating Schenk's creditworthiness, Anchor considered his fixed debt-to-income ratio, a computation that yields the percentage of an applicant's monthly income committed to repayment of recurring fixed expenses. Schenk's percentage exceeded the maximum percentage acceptable and his application was denied. His support and maintenance payments were considered fixed expenses and were used in calculating his percentage. Anchor did not consider as fixed expenses the family maintenance obligations of married persons seeking loans. Without the support and maintenance payments, Schenk's fixed debt-to-income ratio would not have exceeded the maximum acceptable percentage.

Anchor's challenge to Madison's regulatory power raises a question of law that we review independently. See Nelson v. Union National Bank, 111 Wis.2d 313, 315, 330 N.W.2d 225, 226-27 (Ct. App. 1983). The commission's determination that Anchor discriminated is a question of law that will be sustained if reasonable. See Jenks v. DILHR, 107 Wis.2d 714, 720, 321 N.W.2d 347, 351 (Ct. App. 1982).

Madison had the power to regulate Anchor's discriminatory lending practices. Cities possess all powers not otherwise denied them. Section 62.11(5), Stats; Wisconsin's Environmental Decade, Inc. v. DNR, 85 Wis.2d 518, 532-33, 271 N.W.2d 69, 75 (1978). A city's exercise of power is not made invalid because it deals with a matter of statewide concern. Id. at 533, 271 N.W.2d at 76. An exercise of power is invalid only if there is express statutory language restricting or revoking it or if it infringes the spirit of a state law or the general policy of the state. Id.

Madison General Ordinance, sec. 3.23(3), prohibits discrimination in credit transactions because of marital status.[1] Although the state, by statute and regulation, regulates the credit practices of savings and loans, see ch. 215, Stats; Wis. Admin. Code § S-L 1.01 et seq, there is no specific statutory language either restricting or revoking the city's power to regulate in this area. Nor does the city ordinance conflict with the state statute that also prohibits discrimination by lenders based on marital status. See sec. 138.20, Stats.[2] Anchor contends, however, that the city ordinance conflicts with a state policy of uniform statewide regulation of the lending practices of savings and loans.

The city ordinance, by providing an additional agency to prevent discriminatory lending practices, does not conflict with any state policy. The city ordinance regulates lending practices only to the extent those practices are discriminatory. Practices that under the ordinance discriminate based on marital status would also be prohibited under the state statute and regulations. Since the ordinance conflicts with neither state law nor policy and is not expressly forbidden, it is not invalid.

The commission's determination that Anchor discriminated against Schenk because of his marital status was reasonable. Schenk was required to first make a prima facie case of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).[3] A prima facie case is established by showing (1) he belongs to a protected group; (2) he applied and was qualified for a loan; (3) his application was rejected despite his qualifications; and (4) married applicants with his income and expenses were not rejected

based on their fixed debt-to-income ratio. See id. Once established, the burden then shifted to Anchor to present some nondiscriminatory reason for rejecting Schenk's application. See Id.

The evidence Schenk presented established a prima facie case of discrimination. He belonged to the protected group of divorced persons. If he had not been divorced, his family maintenance payments, although still required to support his family, would not have been court ordered and therefore not considered a fixed monthly debt. His fixed debt-to-income ratio would then have been within the acceptable limits. Married applicants with Schenk's expenses and income, but without court-ordered maintenance payments, would not have been rejected for loans based upon their fixed debt-to-income ratio.

In response, Anchor did not present a nondiscriminatory reason for rejecting Schenk's application. It did not show why the family maintenance expenses of married persons are not considered. Although federal law allows lenders to inquire into an applicant's family maintenance obligations, see 12 C.F.R. § 202.5 (d)(1), it does not follow that federal law also allows lenders to base a divorced applicant's creditworthiness on those factors without also considering them for married applicants. Since Anchor did not rebut Schenk's showing of discrimination, the commission's determination was justified.

By the Court.--Judgment affirmed.
Recommended for publication in the official reports.

APPENDIX

[1]Madison General Ordinance, § 3.23(3), provides:

> Credit. It shall be an unfair discrimination practice and unlawful and hereby prohibited for any creditor to discriminate against any person in any credit transaction because of sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, lifespan, honorable discharge, physical appearance, sexual orientation, political beliefs, or the fact that such person is a student as defined herein.

[2]Section 138.20, Stats., provides in part:

> Discrimination in granting credit or loans prohibited. (1) Rule. No financial organization, as defined under s. 71.07(2)(d)l, or any other credit granting commercial institution may discriminate in the granting or extension of any form of loan or credit, or of the privilege or capacity to obtain any form of loan or credit, on the basis of the applicant's physical condition, developmental disability as defined in s. 51.01(5), sex or marital status; provided, however, that no such organization or institution shall be required to grant or extend any form of loan or credit to any person who such organization or institution has evidence demonstrating the applicant's lack of legal capacity to contract therefore or to contract with respect to any mortgage or security interest in collateral related thereto.

[3]Neither the Madison city ordinance nor state statutes or case law address the burden of proof issue in credit discrimination cases. We therefore look to the law developed under the Federal Equal Credit Opportunity Act, 15 U.S.C. § 1691 et seq. Federal courts have applied anti-discrimination decisions from the employment area to ECOA cases. See Carroll v. Exxon Co., U.S.A., 434 F.Supp. 557, 563 n. 14 (E.D. La. 1977).

FOLFY, P.J. (dissenting) The comprehensive provisions of ch. 215, Stats., preempt regulation of the loan practices of savings and loan associations. Chapter 215 demonstrates an intent to have uniform and experienced regulation and enforcement, which would be impossible if every city was allowed to separately regulate. For some of the same reasons that Madison cannot set utility rates, or require banks to make specific investments in the city, or require insurance companies to take improvident local risks, it should not be allowed to regulate Anchor's loan practices. Regardless of the purpose of Madison's

ordinance, because its effect is to regulate loan practices, I would reverse the judgment.

Also, even if Madison was entitled to regulate Anchor's loan practices, it was reasonable for Anchor to treat Schenk's support obligation differently from the support obligation of a married person. Unlike a married person's support obligation, Schenk's court-ordered obligation is fixed. While a married person may reduce or temporarily defer family expenses without fear of being put in jail, Schenk must make his support payments regardless of what other debts he may have voluntarily incurred since his divorce. Schenk must also feed and shelter himself in separate quarters, and he may marry again and create an equal obligation to a second family. While I agree that discrimination in lending based solely on marital status is wrong and should not be tolerated, I consider it equally wrong for the law to require a lender to ignore relevant factual distinctions that exist as a consequence of divorce.

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

Anchor Savings & Loan Association, Petitioner, vs. Equal Opportunities Commission, City of Madison, and Roy U. Schenk, Respondents.	DIRECTIONS FOR JUDGMENT Case No. 81-CV-1691

Before Hone. Richard W. Bardwell, Circuit Judge, Branch #1

This case is before the court on certiorari to review a determination by the City of Madison Equal Opportunities Commission (hereinafter the commission) that Anchor Savings Loan Association (hereinafter petitioner or Anchor) violated section 3.23 (3) of the Madison General Ordinances (MGO) by denying a mortgage loan to Roy U. Schenk, a respondent here.

Section 3.23 (3) provides:

> Credit. It shall be an unfair discrimination practice and unlawful and hereby prohibited or any creditor to discriminate against any person in any credit transaction because of . . . marital status . . .

The facts are not in dispute. In December, 1977, Mr. Schenk, a divorced and single man at the time, applied for a mortgage loan at Anchor in the amount of $24,000 for the purpose of purchasing income property in Madison. Anchor denied the application because Anchor determined that Mr. Schenk had a fixed-debt to income ratio of 49.9%. The maximum ratio allowed by Anchor according to its written standards was 35% for the type loan Mr. Schenk sought. The fixed-debt to income ratio is one factor Anchor considers in establishing credit-worthiness.

In calculating Mr. Schenk's fixed-debt to income ratio, petitioner included as a fixed-debt $500 per month which Mr. Schenk is required by court order entered pursuant to divorce proceedings to pay in

alimony and child support. In calculating an applicant's fixed-debt to income ratio, Anchor does not consider the monthly family expenditures made by a married applicant to support dependents living with the applicant.

In January, 1978, Mr. Schenk filed a complaint with the commission, alleging that Anchor discriminated against him on the basis of marital status, i.e., divorced, in denying him the loan, by considering his alimony and child support obligations whereas Anchor does not consider the support obligations of a married person seeking a loan.

A hearing was held in July, 1980, pursuant to which a commission hearing examiner issued recommended findings of fact, conclusions of law and a proposed order determining that Anchor had violated the ordinance.

Anchor filed a timely appeal, which was heard by the commission in December, 1980. In February, 1981, the commission issued its final order and memorandum opinion, upholding the examiner's finding of discrimination.

Anchor petitioned this court for a writ of certiorari, which we allowed in March, 1981.

The questions for review are as follows:

1) Has the state preempted the field of regulation of credit practices, thus invalidating the city's ordinance?

1) Did the commission lose jurisdiction to make a determination in this case by failing to process Mr. Schenk's complaint within two years?

3) Was the commission's finding of discrimination supported by substantial evidence?

PREEMPTION

Petitioner contends that the City lacks power to regulate lending practices of savings and loan association because that matter is one of state-wide concern which has been preempted by state law.

The sources of city power are the Home Rule Provision of the Wisconsin Constitution, and s. 62.11(5), Stats. Article XI, Section 3 of the Constitution (the Home Rule Provision) provides:

> Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as shall the uniformity affect every city or every village. The method of such determination shall be prescribed by the legislature . . .

Section 62.11 (5), Stats., provides:

> Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry but its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means.

> The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.

Power to act under the Home Rule Provision is limited to matters of local concern and government. The parties agree that regulation of credit practices is a matter of statewide concern. However, the Supreme Court of Wisconsin has held that s. 62.11 (5) empowers cities to act in matters of statewide concern if: (1) The legislature has not expressly withdrawn the power to act; (2) The ordinance does not logically conflict with state law; and (3) The ordinance is not inconsistent with or in conflict with the state law dealing with the same subject matter, or does not defeat the purpose or go against the spirit of state law. Fox v. City of Racine, 225 Wis. 542 (1937). See also Solheim, Conflicts in State and Local Law, 1975 Wis. L. Rev. 840.

In Wisconsin Association of Food Dealers v. City of Madison, 97 Wis. 2d 426 (1980), the Supreme Court of Wisconsin made clear that an ordinance which infringes the spirit of a state law is invalid even if there is no logical inconsistency between the ordinance and the state statute. In that case the Court reversed a court of appeals decision affirming the circuit court's denial of a temporary injunction against enforcement of a city ordinance requiring certain retail outlets in Madison selling milk in nonrefillable containers to also offer milk for sale in refillable containers. The circuit court had reasoned that although the state had also legislated in the field, the ordinance did not directly conflict with any state statute and therefore the plaintiffs were unlikely to succeed on the merits. In reversing, the Supreme Court held the circuit, court abused its discretion by considering only whether the ordnance conflicted with a state statute, and that the court should have also considered whether the ordinance infringed the spirit or policy of state legislation or regulation.

Petitioner does not contend the legislature has expressly withdrawn from the City the power to regulate credit practices. And clearly, the ordinance does not logically conflict with the state statute involved here, which provides:

> S. 138.20 Discrimination in granting credit or loans prohibited. (1) Rule. No financial organization as defined under s. 71.07 (2) (d) 1, or any other credit granting commercial institution may discriminate in the granting or extension of any form of loan or credit, or of the privilege or capacity to obtain any form of loan or credit, on the basis of the applicant's . . . marital status . . .

The crux of petitioner's preemption argument is that the ordinance defeats the purposes of state law to vest authority in the commissioner of savings and loan to regulate credit practices in this state. Petitioner relies on Wisconsin's Environmental Decade, Inc., v. DNR, 85 Wis. 2d 518 (1978). In the Decade case the Supreme Court of Wisconsin struck down a City of Madison ordinance which prohibited the chemical treatment of waters within the City, in the face of a state statute specifically authorizing the Department of Natural Resources to "supervise chemical treatment of waters for the suppression of algae, aquatic weeds, swimmers' itch and other nuisance producing plants and organisms". Citing Fox v. City of Racine, supra, the Court stated that although control of the state's navigable waters is a matter of statewide concern, that fact does not preclude local regulation, as long as local regulation does not logically conflict with state legislation or regulation and does not infringe the spirit of state law. The Court held that the ordinance in that case did logically conflict with the statute authorizing the department to issue permits to riparian property owners for chemical treatment of state waters.

On the basis of the above case, Anchor forcefully argues that by granting broad authority to the commissioner of savings and loan, and by providing in s. 215.03 Stats., that "all associations shall be under the supervision and control of the commissioner . . .", the legislature intended to preempt the field of credit practices. (emphasis added)

We think the above case should be distinguished from the case at hand. In the Environmental Decade case, the department had implemented a permit granting program. The court was concerned with the fact that "allowing the City of Madison to prevent treatment which the DNR had authorized would thereby frustrate the department's program of water resource management and defeat the clear legislative purpose to establish the department as the central unit of state government with general supervision and control'".

In the instant case, assuming the legislature intended supervision and control of credit practices to be centralized in the commissioner of savings and loan, the City has not infringed the commissioner's authority by enacting an ordinance almost identical in language to the statute enforced by the commissioner. This is not a situation in which the state statute has been interpreted by the commissioner to permit the lending practice here challenged.

Based on the foregoing, we conclude the ordinance does not infringe upon the spirit of state law and is therefore valid.

LOSS OF JURISDICTION

Petitioner next argues that the commission lost jurisdiction to render its decision in this case by failing to process Mr. Schenk's complaint within two years. We must reject that argument.

Petitioner relies on 3.23 (10) (c) (2), MGO, which was in effect when Mr. Schenk filed his complaint on January 6, 1978, but which was repealed on July 10, 1979. That section required the commission to process all complaints within two years from the filing of the complaint, and was interpreted by this court to be jurisdictional in City of Madison v. Community Action Commission for the County of Dane and City of Madison, Inc., Case No. 161-291 (1979). That case was decided before the section was repealed, so it does not control here.

We agree with the decision of Judge Currie in State ex rel. Badger Produce, Inc., v. EOC, Case No. 79-CV-4405 (1980). In that case the complaint was filed on July 26, 1977. The repeal ordinance was enacted July 10, 1979, 16 days prior to the expiration of the two-year period. Judge Currie held that the repeals, ordinance, being procedural, operated retroactively to prevent the two-year rule from depriving the court of jurisdiction.

FINDING OF DISCRIMINATION

The parties appear to agree that cases decided under the federal Equal Credit Opportunity Act should be looked to for guidance in interpreting the ordinance. The language of the federal act is almost identical to that of the ordinance. Petitioner argues that regulations adopted under the federal statute indicate the credit practice here challenged complies with federal law. Regulation B, Section 202.5 (d) (1), provides:

> If an applicant applies for an individual, unsecured account, a creditor shall not request the applicant's marital status . . . *[5]

*Footnote 5 to that section provides:

> This provision does not preclude requesting relevant information that may indirectly disclose marital status, such as asking about liability to pay alimony, child support or separate maintenance; . . . (emphasis added)

Section 202.5 (d) (4) provides:

> A creditor shall not request information about birth control practices, intentions concerning the bearing or rearing of children, or capability to bear children. This does not preclude a creditor from inquiring about the number and ages of an applicant's dependents or about dependent-related financial obligations or expenditures, provided such information is requested without regard to sex, marital status or any other prohibited basis.

There are two problems with Anchor's argument that because its credit practices are permitted under federal law, they should be permitted under the ordinance. First, the fact that federal law permits inquiry into an applicant's alimony and child support obligations does not logically compel the conclusion that federal law condones basing determination of a divorced person's credit worthiness in part on the amount of those obligations, without also considering equivalent obligations of a married person. Petitioner cites no authority for such a conclusion, and as respondent-Schenk points out in his pro se brief, the question appears not to have arisen under federal law.

Therefore we cannot conclude that petitioner is in compliance with the federal law. Second, even if petitioner were in compliance with federal law, the commission's contrary conclusion would not necessarily be unreasonable. The scope of review on a writ of certiorari is narrow. State ex rel. De Luca v. Common Council, 72 Wis. 2d 672 (1976).

Anchor contends the evidence does not support a prima facie finding of discrimination. While the parties agree that cases decided under federal equal employment opportunities law supply guidance in equal credit practices cases, they disagree as to which line of cases under equal employment law applies here.

In the field of equal employment opportunities law, two theories are available to a plaintiff, and plaintiff's burden of proof depends on which theory is used. "Disparate treatment" cases focus on the conduct of an employer in a particular instance of alleged discrimination; "disparate impact" cases focus on the effects of a facially neutral employment practice. Anchor maintains the "disparate impact" theory applies here, and cites cases under the Equal Credit Opportunities Act, in which that theory of discrimination is advanced. Carroll v. Exxon Company, U.S.A., 434 F. Supp. 557 (1977); Cragin v. First Federal Savings and Loan Association, 498 F. Supp. 379 (1980). However, the court in Carroll suggests that both theories apply under the federal act. See FN 14 at pg. 563.

The credit practice here is not one which is "facially neutral." All applicants are asked whether or not they are under court order to pay alimony or child support; however, the question by its nature singles out divorced persons. For that reason we conclude the "disparate treatment" theory applies here.

Under the "disparate treatment" theory of employment discrimination, a prima facie case is made by showing that the plaintiff is a member of a protected class of persons, that s/he applied and was qualified for a position which the employer was seeking to fill, that s/he was rejected, and that after his or her rejection the employer continued to seek applications from persons with plaintiff's qualifications. McDonnell-Douglas v. Green, 411 U.S. 792 (1977).

Adjusting the burden of proof of McDonnell-Douglas to the facts of the equal credit opportunity case at hand, we find that respondent-Schenk satisfied his burden of proof before the examiner. Mr. Schenk showed he was a divorced person who applied for a loan for which, except for the unlawful discrimination, he was otherwise qualified,* and that he did not receive the loan. We take judicial notice of the fact that Anchor continues to grant loans to qualified persons.

Once a prima facie case of discrimination is made, the employer, or in this case the savings and loan association, has the burden of proving there was a legitimate, non-discriminatory reason for refusing the loan to the applicant. McDonnell-Douglas, supra.

Anchor maintains that Schenk was denied the loan, not because he was divorced, but that his fixed-debt to income ratio was too high, which constitutes a legitimate, non-discriminatory reason for denying the loan.

The basis of this argument is that there is a legitimate difference between support obligations which have been reduced to a court order, and support obligations in general. That difference, Anchor argues, is that fixed debts decrease the amount of discretionary income available to repay the mortgage loan while non-fixed debts do not. Anchor argues that family expenses, which are not fixed by court order, can be adjusted by a debtor or mortgagor in order to meet payments on the loan as they become due. It is of course true that family expenditures are to some extent flexible -- a family can eat steak or baloney. However, we agree with the commission that there is an expense floor, depending on the number of dependents, required to provide the necessities. That floor or base amount cannot be said to be discretionary, either practically or legally. In the legal sense, the amount needed by the head of a family to provide the necessities of life is as established in the law as is the need to make alimony and support payments. Absence of a court order does not mean absence of the legal duty of support. We conclude Anchor failed to demonstrate a legitimate, non-discriminatory reason for the differential treatment.

Based on the foregoing, we must and do hereby affirm the order of the commission. Counsel for the commission may prepare a formal judgment of affirmance, copy of which should be submitted to counsel for Anchor Savings & Loan Association before submission to the court for signature.

Dated May 25, 1982.

By the court:

Richard W. Bardwell
Circuit Judge

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*The evidence supports the conclusion that a married person in an otherwise identical situation, that is, with the same number of dependents and the same amount of income and debts, would have satisfied the fixed-debt to income requirement, with a ratio of 18.1%.

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN

Roy U Schenk 516 South Orchard Street Madison, Wisconsin 53715	

Complainant vs. Anchor Savings & Loan Association 25 West Main Street Madison, Wisconsin 53703 Respondent	FINAL ORDER Case No. 5012

The examiner issued his Recommended Findings of Fact, Conclusions of Law and Order on September 26, 1980. Timely exceptions were filed, written arguments were submitted, and oral arguments were heard by the Commission.

Based upon a review of the record in its entirety, the MADISON EQUAL OPPORTUNITIES COMMISSION, by a 5-2 vote, issues the following:

ORDER

That the attached Recommended Findings of Fact, Conclusions of law and order of the examiner is affirmed by the commission subject to the following modification:

> Conclusion of Law 3 is deleted and the following conclusion is substituted therefore:
>
> Respondent shall immediately modify its underwriting standards to either not consider court-ordered alimony and child support payments of any applicants as part of the fixed-debt to income ratio or to consider family expenses of all applicants as part of the fixed-debt to income ratio. Respondent shall forward a copy of the revised standard to the Madison Equal Opportunities Commission within thirty (30) days of receipt of this order.

As modified the decision of the examiner shall stand as the FINAL ORDER herein.

Commissioners Bell, Fineman, Goldstein, Kuester and Ware join in support of the FINAL ORDER as stated above. Commissioners Perkins and Swamp dissent. Commissioners Basurto, Brown, Gassman, Hall and McShan did not participate. The majority also joins with Commissioner Fineman in her following Memorandum Opinion:

EQUAL OPPORTUNITIES COMMISSION MEMORANDUM OPINION

This controversy arises under Madison General Ordinance 3.23 which prohibits discrimination based on marital status. Respondent, Anchor Savings and Loan Association (Anchor) classifies court ordered child support and/or spousal maintenance payments as "fixed obligations". Such payments are then included as debts in the computation of the income/debt ratio which is one factor which establishes the "creditworthiness" of a potential borrower.

Complainant, Roy U. Schenk, was denied a mortgage by Anchor. The maximum income/debt ratio allowed on this type of loan is 35%. Schenk is under an obligation to provide a total of $500.00/month for the support of his ex-wife and his four children. The Hearing Examiner found that Anchor's inclusion of Schenk's court ordered support payments in the debt category was discriminatory because analogous expenses were not considered debts for married persons. The Hearing Examiner issued recommended

findings of fact and conclusions of law which were accompanied by a recommended order. The order provided that Anchor cease discrimination on the basis of marital status against Schenk; that Anchor pay the difference between the mortgage interest rate Schenk obtained from another savings and loan institution and the one which he would have obtained from Anchor for a ten year period; and that Anchor modify its underwriting standards, to either not consider child support and/or maintenance payments as fixed-debts, or to consider analogous family expenses for all applicants as debts whether subject to court order or not.

Anchor disputes some of the recommended factual findings and conclusions of law made by the Hearing Examiner. Some of the disputed factual findings are irrelevant to the initial legal issue involved in this case. Other findings disputed by Anchor are supported by the evidence introduced at the hearing.

I. Legal Issue:

The legal issue is whether it is discriminatory to treat the obligations of unmarried or divorced persons to support their children and/or ex-spouse differently from the analogous obligations of married persons, since the obligations of the former category of potential borrowers is in the form of a fixed-sum judgment while that of the latter is not. The Commission agrees with the Hearing Examiner that the practice used by Anchor in assessing Schenk's fixed debts was discriminatory. Anchor has asserted that because all applicants, married or not, are asked if they are under a court support order, and the amount of all such orders is counted as a fixed debt, its treatment is not discriminatory on the basis of marital status. As stated on page 5 of its Post Hearing Memorandum, Anchor's primary concern in assessing the income/debt ratio is to ensure that the applicant has enough discretionary income to meet all exigencies and that his or her cash flow is sufficient to ensure the mortgage payments are made. This legitimate concern does not explain the difference in treatment between those applicants with family responsibilities who are married and those with similar responsibilities who are unmarried. Individuals with dependents who have either terminated their marriages or never been married are for that reason in a position where court intervention is necessary in order to protect dependent children and spouses. Married persons living with their families also have financial obligations to their dependents. Their obligations, however, have not been reduced to judgment because the day-to-day family relationship provides the incentive to adequately support a spouse or children. In fact, the failure to provide necessary and adequate support for a minor child or spouse may result in a person being charged with a misdemeanor and fined or imprisoned, and appropriate support ordered. Wis. Stat. §520555; See also id. §767.08. The absence of a court order does not mean that money spent on essential and non-deferrable items such as food, medical expenses or clothing will be available for mortgage payments.

While it may be true, as Anchor argues, that separation or divorce may increase expenses because either necessitates the maintenance of two households, certain expenditures do not change depending upon which parent a dependent lives with. The court ordered support payments are partly based on an assessment of how much money must be spent to provide for dependents on a day to day basis. To classify the amount which must be spent on essential and non-deferrable family expenses for unmarried persons as debts, while not considering them as such for married persons is discriminatory. Financial obligations to family may be considered in the determination of creditworthiness, but if they are, they must be considered for all applicants not just those who are under a court order.

This conclusion is supported by the Federal Regulations:

> . . . [A creditor is not precluded] from inquiring about the number and ages of an applicant's dependents or about dependent-related financial obligations or expenditures, provided such information is requested without regard to sex, marital status or any other prohibitive basis. [Emphasis supplied] Federal Equal Credit Opportunity Act, Regulation B, 202.5(d)(4).

This conclusion is also supported by a consideration of the practical effect of such a practice on unmarried persons under an obligation to support dependents. If Schenk's support obligations are considered debts, he needs an income in excess of $2,200.00 per month to qualify for a mortgage under Anchor's income/debt ratio guidelines. This is approximately $700 more than he currently earns. If his income were to increase by $700.00 each month, his ex-wife could petition the Family Court for an increase in maintenance and child support-based on this "changed circumstance". If the court ordered the support payments increased, the increase would be calculated as debt, and Schenk would not qualify for a mortgage. A divorced person with dependents could conceivably be precluded from purchasing a home until after the children reach majority.

II. Objections To Factual Findings

Anchor disputes the factual finding that it would have granted Schenk a mortgage if his support payments had not been considered as debts even though his income/debt ratio would then have been well below the 35% maximum. Anchor indicates that two additional factors are significant in assessing creditworthiness: the appraised value of the property and the general credit record of the applicant.

The first question is whether Anchor or Schenk should bear the burden of proof on the question of creditworthiness. It seems reasonable to allocate that burden to Anchor. In the normal course of its business, it has access to records and institutional evaluations which provide the basis for its assessment of the general credit records of applicants. To require Schenk to affirmatively demonstrate that he had a good credit record would make his task unnecessarily difficult. No matter how much information he introduces, Anchor could always question whether there was full disclosure or argue that the information was not complete. It makes more sense to require Anchor to demonstrate as an affirmative defense that some permissible reason existed which would have resulted in it denying Schenk credit even if he came within the income/debt ratio.

Even if the burden of proof had been placed on Schenk, there was evidence introduced which supported the conclusion that he had a good credit record. After he was denied a mortgage by Anchor he applied for and was granted a mortgage by First Federal Savings and Loan, an institution which presumably conducts credit checks similar to those conducted by Anchor.

Evidence was also introduced that the appraised value of the property was $31,000.00. In order to grant the mortgage, Anchor would have required that the value be at $30,000.00.

The recommended order of the Hearing Examiner is approved:

Signed and dated this 20th day of February, 1981.

Roberta Gassman, President E.O.C.
James C. Write, Executive Director E.O.C.

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN

Roy U Schenk	

516 South Orchard Street Madison, Wisconsin 53715 Complainant vs. Anchor Savings & Loan Association 25 West Main Street Madison, Wisconsin 53703 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 5012

The complaint in the above-entitled matter was filed with the Madison Equal Opportunities Commission on January 6, 1978 alleging unlawful discrimination on the basis of marital status in regard to credit in violation of Section 3.23 of the Madison General Ordinances.

Frederick Petters investigated the complaint and issued an Initial Determination of No Probable Cause on November 21, 1978. On review of the No Probable Cause Determination pursuant to Rule 7.5 of the Equal Opportunities Commission, the Hearing Examiner, Robert Greene, reversed the Initial Determination and issued a finding of Probable Cause, dated November 21, 1979.

Conciliation was waived or unsuccessful, and the case was certified to public hearing. A hearing was held on July 28, 1980. Present were the Complainant, Roy U. Schenk, in person, and the Respondent by Attorney Marilyn A. Madorsky of the firm Stroud, Stroud, Willink, Thompson and Howard, and Ron Smith who was an employee-representative for the Respondent.

Based on the record of the hearing, the Examiner makes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. Roy Schenk, the Complainant, is an adult mate.
2. Anchor Savings and Loan is a creditor doing business in the City of Madison.
3. Complainant applied for a mortgage loan at the Anchor Savings and Loan Offices located at 25 West Main Street, Madison, Wisconsin. The application was signed and dated by Complainant on December 21, 1977, and the Complainant was a divorced and single man at the time of the loan application.
4. Complainant applied to Respondent for a $24,000 loan at an interest rate of 9-1/4% for the purpose of purchasing income property located at 412 South Dickinson Street, Madison, Wisconsin.
5. Complainant was rejected for the loan by Respondent because he (Complainant) had a fixed-debt to income ratio of 49.9%, in excess of Respondent's maximum-allowed ratio.
6. The maximum fixed-debt to income ratio allowed by Respondent according to its written standards was 35% for the type of loan which Complainant was seeking.
7. Respondent considered the property in question as a two-family, non-owner occupied unit for which Respondent was lending money at the time at 9.25% plus 1% service fee plus costs.
8. Respondent's procedure for lending was to refer each application to a three-member loan committee. The committee would then consider the following factors in the following order:
   a. Whether an individual met Respondent's creditworthiness guidelines, as outlined in its

Underwriting Standards, including the fixed-debt to income ratio requirement.
b. An appraisal of the property to determine whether it was of sufficient value to justify the amount of the loan.
c. A credit report to determine whether or not the individual's past credit history warranted the granting of the loan.

9. Because Complainant was rejected on the basis of exceeding the Respondent's maximum fixed-debt to income ratio, neither an appraisal nor a credit report were ever completed or considered by the loan committee.
10. The loan committee that examined Complainant's application consisted of Ron Smith, Carl Solberg and Dick Riddle.
11. Complainant was determined to have the following relevant income and debt figures:
INCOME: Total monthly income of $1,574, consisting of base employment income of $1,050 plus net rental income of $224 from a Brooks Street property plus projected net rental income of $304 from the Dickinson Street property Complainant was proposing to buy.
DEBT: Total "fixed debt" of $785 per month, consisting of $285 per month on a first mortgage on one of Complainant's properties plus $500 in court-ordered alimony and child support payable to Martha Schenk.
12. The portion of the $500 allocated to alimony and child support at the time of the loan application was $120 for alimony and $380 for child support.
13. Complainant at the time of the loan application had four dependent children for which he was paying the above child support, and he claimed all four as dependents on his tax returns.
14. The requirement to pay alimony and child support grew out of Complainant's divorce from Martha Schenk.
15. Respondent would have made no inquiry nor would have considered the monthly family expenses for wife and dependents of a married person with a wife and four dependent children who otherwise had the same total income and expenses as Complainant and was otherwise similarly situated to the Complainant.
16. Respondent's usual practice in calculating fixed-debt to income ratio would have been not to include the projected income from the Dickinson Street property. However, because Complainant informed Respondent that he would file a discrimination suit against Respondent if he were not granted a loan, Respondent included the projected $304 net monthly income from the Dickenson Street property.
17. Had Respondent not included the projected net monthly income from the Dickinson Street property, Complainant's debt to income ratio would have been approximately 62%, consisting of $785 debt and $1270 total monthly income, if the alimony and child support were considered part of the debt figure.
18. If the alimony and child support were not considered part of the fixed-debt figure, the Complainant would have had the following ratios:
Ratio 1: Including projected Dickinson Street income
Debt: $285/Income: $1,574 = 18.1%
Ratio 2: Excluding projected Dickinson Street income
Debt: $285/Income: $1,270 = 22.4%
19. Had Respondent not included Complainant's alimony and child support in the calculation of Complainant's fixed-debt to income ratio, Complainant would have met Respondent's minimum creditworthiness standards including having a fixed-debt to income ratio of less than 35%.
20. The appraised value of the property known by address as 412 South Dickinson Street around the time of the loan application was $31,000.
21. In order to receive the loan from Respondent, the appraised value of the property would have had to have been a minimum of $30,000.
22. Subsequent to being denied a loan by Respondent, Complainant received a loan from First Federal Savings around January 10, 1978 for $22,900 at 9-3/4% on the 412 South Dickinson Street

property.

23. Complainant had adequately made his payments up to time of the hearing on the First Federal loan referred to in Finding 22.
24. Respondent used what it believed to be "industry-wide standards" in the consideration of loan applications and granting of loans.
25. Had Complainant not been rejected on the basis that his fixed-debt to income ratio exceeded Respondent's standards, Complainant would have received a loan from Respondent.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant is a member of a protected class, marital status, within the meaning of Section 3.23 of the Madison General Ordinances.
2. Respondent is a creditor within the meaning of Section 3.23 of the Madison General Ordinances.
3. Respondent discriminated against Complainant on the basis of marital status in regard to the extension of credit and by failure to make a credit sale in violation of Section .3.23(3) of the Madison General Ordinances.

RECOMMENDED ORDER

1. Respondent cease and desist from discriminating against Complainant on the basis of marital status in the extension of credit and in making credit sales to the Complainant.
2. Respondent pay to the Complainant the difference in cost between the loan Complainant applied for from Respondent and the loan Complainant received from First Federal Savings and Loan after rejection by Respondent to be calculated as follows:
   a. Based on $22,900, Respondent shall reimburse Complainant for the 0.5% annual interest difference between 9.25% and 9.75% over a ten-year (10-year) period beginning retroactively from January 10, 1978.
   b. Based on $24,000, the Respondent shall reimburse to the Complainant the amounts, if any, by which the cost of the First Federal Loan, including but not limited to appraisal fees and loan fees and abstracting fees, exceeded the costs of the loan that Complainant would have received from Anchor Savings and Loan.
3. Respondent shall immediately modify its underwriting standards to not consider court-ordered alimony and child support payments of any applicants as part of the fixed-debt to income ratio, or to consider the analogous family expenses of all applicants as part of the fixed-debt to income ratio. Respondent shall forward a copy of the revised standard to the Madison Equal Opportunities Commission within thirty (30) days of receipt of this order.

MEMORANDUM OPINION

The Complainant established that he was a divorced and single man at the time he applied for a loan from Respondent to purchase income property. At the time of the loan application, Complainant was paying $500 in court-ordered alimony and child support for an ex-wife and four dependents. Such court-ordered payment arose out of Complainant's divorce.

By testimony, the Complainant further established that a married man with a wife and four dependents and otherwise similarly situated to the Complainant in terms of income, debts and otherwise would not have had to provide any information to Respondent regarding family expenses for the wife and dependents in order to obtain a loan from Respondent.

Complainant further established that not only was he required to supply the support information to Respondent in order to obtain the loan, but that Respondent also used the information in the calculation

of his fixed-debt to income ratio which was the sole basis of Respondent's refusal to deem him creditworthy and to complete the final two steps of Respondent's loan process: appraising the property and doing a credit report on Complainant.

As a justification for its process Respondent cites Regulation B issued by the Board of Governors of the Federal Reserve System pursuant to Section 703 of the Equal Credit Opportunity Act, 15 U.S.C. 1691 et. seq. Regulation B (12 CFR 202) became effective on March 23, 1977, prior to the time of Complainant's loan application.

Section 202.4 of said Regulation B states that:

> A creditor shall not discriminate against an applicant an a prohibited basis regarding any aspect of a credit transaction.

Rule 202.2(z) of said Regulation B includes "marital status" in the definition of "prohibited basis," and Respondent is a "creditor" and the transaction involved in this matter is a "credit transaction." Therefore, it can be concluded that Section 202.4 (above) of Regulation B clearly proscribes discrimination on the basis of marital status in a credit transaction.

However, Rule 202.5(d) of Regulation B upon which Respondent relies states as follows:

> (1) If an applicant applies for an individual, unsecured account, a creditor shall not request the applicant's marital status unless the applicant resides in a community property state or property upon which the applicant is relying as a basis for repayment of the credit requested is located in such a state[5] . . . .
>
> Footnote 5 relating to Section 202.5(d)(1) states:
>
> The provisions does not preclude requesting relevant information that may directly disclose marital status such as asking about liability to pay alimony, child support or separate maintenance . . . Such inquires are allowed by the general rule of subsection (b)(1).
>
> Subsection (b)(1) of Section 202.5 states that:
>
> Except as otherwise provided in this section, a creditor may request any information in connection with an application.

Section 202.5 can be construed to authorize the requesting of "relevant information that may indirectly disclose marital status." Thus, it might not have been unlawful discrimination to request information under the federal regulation regarding liability to pay alimony or child support.

However, like Section 3.23 of the Madison General Ordinances, Regulation 8 also prohibits discrimination by a creditor on the basis of marital status in a credit transaction. Therefore, Respondent erroneously relies on the federal regulation as a defense because such regulation may authorize the gathering of the information, it does not authorize the discriminatory application of the information on the basis of marital status.

And where it was established that the family expenses of a married individual are not even inquired into, as well as not being used in the calculation of the fixed-debt to income ratio, and it was established that a similarly situated married person who did not have court-ordered alimony or child support payments

but who had greater family expenses than Complainant could have received a loan from Respondent, there is sufficient evidence to show that the application of the Complainant's child support and alimony payments to the fixed-debt to income ratio constituted unlawful discrimination on the basis of marital status in regard to credit in violation of Section 3.23 of the Madison General Ordinances.

Further, the Recommended Findings of Fact express why, if Complainant had not been unlawfully rejected on the basis of his fixed-debt to income ratio being too great (because of the inclusion of the alimony and child support), it is this Examiner's belief that Complainant would have received the loan and therefore is entitled to the recommended make-whole remedy.

Signed and dated at Madison, Wisconsin this 26th day of September, 1980.

Allen T. Lawent
Hearing Examiner